Petition

No. 81-619

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IN THE

Supreme Court of the United States

October Term, 1981

ANTONIO B. BASCARO
Petitioner.

V.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Is the Sixth Amendment right to a fair trial by jury violated when the defendant is convicted by a jury that includes jurors who slept through critical testimony?

B. Is the Sixth Amendment right to a fair trial by jury violated when the defendant is prevented from developing a record that supports the foreman's testimony that a juror was sleeping during critical testimony?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Antonio B. Bascaro, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion below was an unpublished summary affirmance. It is attached hereto as Exhibit A.

JURISDICTION

Petitioner petitions this Court to review the July 24, 1981 decision of the Fifth Circuit Court of Appeals affirming his conviction for violating the Federal Conspiracy Statute, 21 U.S.C. §846 and 841(a)(1). The appelllate court affirmed without opinion. (see attached Exhibit :A). This court has jurisdiction pursuant to 28 U.S.C. § 1254, and 19 U.S. Supreme Court Rules, Rule 19. No petition for rehearing was filed, because the Fifth Circuit affirmed without opinion.

QUESTIONS PRESENTED FOR REVIEW

A. Is the Sixth Amendment right to a fair trial by jury violated when the defendant is convicted by a jury that includes jurors who slept through critical testimony?

B. Is the Sixth Amendment right to a fair trial by jury violated when the defendant is prevented from developing a record that supports the foreman's testimony that a juror was sleeping during critical testimony?

CONSTITUTION, STATUTES, RULES, ETC...

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

Fed. R. Crim. Pro. 606(B):

"[u]pon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to *to assert to or dissent from the veredict or*

indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether...any outside influence was improperly brought to bear upon any juror.."

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the court below.

The appellant, Antonio Bascaro, was the defendant in the trial court and the appellee, The United States of America, was the prosecution. In this brief, the symbol "R" will be used to designate the various transcripts of proceedings before the trial court. "TR." will be used to designate the transcript of the trial itself. "SR." will designate supplemental records. All emphasis is added unless otherwise indicated.

On June 27, 1979, the defendant and ten co-defendants were charged by Indictment with one count of conspiracy to possess marijuana and one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 846 and 841(a)(1) respectively. [R. 1].

On June 23, 1980, the defendant proceeded to jury trial. [TR. Vol. 1 & 2]. Prior to trial the defendant and the prosecutor entered into a written stipulation to waive alternate jurors and proceed with less than twelve jurors. [R. 652].

The defendant was found and adjudicated guilty as to Counts I and II [TR. Vol. 2, 22A-25A]. Defendant filed a Motion for disclosure on the jury question [R. 715]. Hearing on said motion, Motion for New Trial (R. 704, 739), and sentencing were on August 6, 1980 [SR. Vol. 1]and supplemental proceedings were held on August 26, 1980 [S.R. Vol. 2], at which times all motions were denied (SR. Vol. 2, 12). Appellant filed his Notice of Appeal (R. 721) pursuant to Fed. Rule App. Pro. Rule 6, and 28 U.S.C. § U.S.C. § 1291.

On July 24, 1981, the United States Court of Appeals for the

Fifth Circuit affirmed without opinion, (see attached Exhibit A), in *United States v. Bascaro* No: 80-7602. Appellant petitions this court to exercise its certiorari jurisdiction, pursuant to U.S. Sup. Ct. Rules Rule 19, and 28 U.S.C. § 1254.

B. Statement of the facts.

During the post-trial proceedings, the jury foreman testified that one juror had slept through the proceedings. (SR. 9, 17, 19). The discovery of this fact was inadvertent, and occurred during a hearing on a question the jury had propounded to the court (SR. 3). The court never answered the jurors' inquiry, because the jury announced that it had reached a veredict before the court had a chance to answer it. (SR. 14). During a subsequent inquiry, it was discovered that the jurors had requested that the testimony of a confidential informant be read to the jury. (SR. 6). The reason for the request was that the juror making the request had been napping, and he could not remember that portion of the testimony. (SR. 11).

At a second supplemental hearing, the trial court restricted examination of the juror. (SR. Vol. 2, 11-12). At the initial hearing, the foreman had alleged that this juror admitted to sleeping through the testimony. (SR. 6-11). The court denied defendant's Motion for a New Trial, and this appeal ensued. (SR. 12).

SUMMARY OF ARGUMENT

This Court should grant certiorari to guide the lower courts. The Districts are becoming increasingly embroiled in lengthy trials. Often, severe complications develop as a result of the personal problems of jurors. To some jurors, the mental or physical stress is too great. Others fall asleep.

The Federal Rules of Evidence prohibit a juror from impeaching his veredict,(see Fed. Rules Ev. 606(B)). However, where a juror was mentally unfit to render his judgement, the

defendant should be allowed to inquire into that fitness to determine if he was convicted by a jury composed of twelve competent individuals. The Sixth Amendment Right to a trial by jury requires that the jury be comprised of twelve competent individuals. The failure to allow such an inquiry, where the jury foreman tells the court that the "sleeping juror" needed to have testimony read back to him because the juror was sleeping, denies a defendant his Sixth Amendment right to a competent twelve person jury. The allegation of unfitness to remain on the jury relates to the juror's perception of the events of the trial, not to the content of his deliberations.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING JURORS WHO BECOME INCOMPETENT TO PARTICIPATE IN THE DELIBERATIVE PROCESS DURING THE COURSE OF THE TRIAL.

The case-at-bar illustrates the conflict between the Sixth Amendment, and Fed. R. Ev. 606(b). In the court below, the Government argued that petitioner's request to interrogate the "sleeping juror" constituted an improper attempt to impeach that juror's verdict see *Government's Appellate Brief*, p. 26-27; Fed. R. Ev. 606(B).

Petitioner argued that the inadvertant discovery that the juror had not been awake during portions of critical testimony was a deprivation of his Due Process right to a unanimous twelve-person jury. Appellant's Brief, p.17. Bascaro analogized the sleeping juror to an extraneous influence on the jury.

The trial court held that petitioner could not question the sleeping juror, because the Court felt that petitioner was attempting to impeach his verdict (SR. Vol. 2, p. 11-12). The Fifth Circuit affirmed without opinion.

In *Mattox v. United States*, 146 U.S. 140 (1892), this Court recognized that a juror is competent to testify as to newspaper articles or comments by the bailiff during the course of jury deliberations. However, it is improper to question the jury as to the substance of their deliberations, their votes, their mental or physical reactions, or their discussions see *Hyde v. United States*, 225 U.S. 347 (1912); *McDonald v. Pless*, 238 U.S. 264 (1915)).

The "sleeping juror" issue does not touch upon discussions, arguments, or internal processes. It is also not an "extraneous matter". Instead, the question focuses on the juror's competence to participate in the deliberations.

The Fifth Circuit has recognized that a sleeping juror cannot participate in the deliberation process(*United States v. Smith*, 550 F. 2d. 277 (5th Cir. 1977), *Cert. Denied*, 98 S. Ct. 138 (1977); *United States v. Cohen*, 530 F. 2d. 43 (5th Cir. 1976); *cert. denied*. 975 ct. 149(1976). Because the sleeping juror is not conscious, he is not competent to participate in the proceedings.

It is important for this court to clarify the scope of the Sixth Amendment, insofar as the sanctity of jury deliberations are concerned. Recently, there has been a dramatic increase in cases where jurors became mentally or physically incompetent to continue with deliberations.

Two recent decisions in the Southern District of Florida illustrate this tension. In *United States v. Kopituk*, 5th Cir. No. 80-5025, a juror developed a psychotic condition that necessitated her removal from the jury. (see, TR: Vol. S-1, p. 11-14; TR; Vol. 105, p. 25-26, *Kopituk* Record on Appeal). In *United States v. Meinster*, 5th Circ. No.79-3189; 80-5320, a juror's physical illness necessitated his removal from the jury. In both cases, the incapacitated jurors were replaced after deliberations had begun.

Had the mentally ill juror remained on the jury in *Kopituk*, the

Defendants would have been convicted by a jury composed of eleven competent individuals, and one incompetent individual. A post-veredict inquiry into the "psychotic jurors' " condition would not constitute improper impeachment of the "psychotic juror's" veredict. Instead, it would focus the Court on the competence of the juror to reach her veredict in the first place.

In the present case, the "sleeping juror" participated in the deliberations. Because he did not percieve the testimony first-hand, he was incompetent to participate in the deliberations. See, Generally, Fed. R. Ev. Rule 602 (relating to the competency of witnesses). See, also, *United States v. Smith, Supra. and United States v. Cohen, Supra*. Thus, discovery of his incompetence does not impeach his veredict, but focuses on his ability to render a veredict consistent with Sixth Amendment Standards.

The fact that the "sleeping juror" was discovered after the deliberations had concluded does not change the fact that the "sleeping juror" was incompetent. In fact, had the trial court been available at the time that the note was first presented, this discovery could have occurred prior to the rendering of the veredict. The court's deriliction in failing to be available, See, e.g. *United States v. Schor,* 418F. 2d.26 (2*d*. Cir. 1969), helped to create the error.

Moreover, if the mentally ill juror had participated in the *Kopituk* veredict, it would have been manifestly unjust to prevent the defendant from presenting evidence of the juror's mental illness.

The Second Circuit has held that absent "substantial if not wholly conclusive evidence of incompetency...", the court was "unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party". *United States v. Dioguardi*, 492 F. 2d. 70(2d. Cir. 1974). However, the court emphasized that a different result might be reached if there had been a "closely contemporaneous and independent" post-trial adjudication of incompetency. *Fd.*

In the present case, there was a close and contemporaneous allegation by the jury foreman that a juror slept during the trial proceedings.

CONCLUSION

This court should grant Certiorari to resolve the questions presented herein, and to clarify these issues for the Appellate Courts.

Respectfully Submitted,

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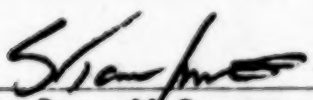
By 
STANLEY M. GOLDSTEIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 22nd day of August, 1981 to Melissa S. Murdell, Assistant United States Attorney, P.O. Box 8999, Savannah, Georgia 31412, Counsel for the Respondent, United States of America.

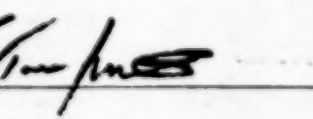
by 

Exhibit A.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7602

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

ANTONIO B. BASCARO,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

(July 24, 1981)

Before: RONEY, VANCE AND RANDALL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.